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Supreme Court, U.S.
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No. 081251 APR 7 - 2009

In The OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES

Burriss Electrical, Inc Petitioner,

v.

Occupational Safety and Health, South
Carolina Department of Labor
Respondent.

On Petition for Certiorari to the Supreme
Court of the State of South Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Did the South Carolina Court of Appeals err in finding that Burriss knowingly violated OSHA and deliberately subjected employees to serious risk of harm based on a prior OSHA citation that had been withdrawn and involved very dissimilar facts?

2) Did the South Carolina Court of Appeals ignore uncontested evidence that Burriss had no appreciation of the OSHA standards, or the danger, and therefore could not have willfully violated OSHA?

3) Did the South Carolina Court of Appeals incorrectly find that Burriss deliberately ignored OSHA when, in fact, the uncontroverted evidence is that Burriss was very careful about the safety issues it knew about?

List of Parties

- 1) Burriss Electrical, Inc. Burris Electrical Inc. has no parent corporation and no publicly held company owns 10% or more of Burris Electrical Inc.
- 2) Occupational Safety and Health, South Carolina Department of Labor

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OPINIONS BELOW

The opinion of the South Carolina Court of Appeals is unpublished and is reprinted in the Appendix hereto.

The order of the South Carolina Supreme Court denying certiorari is unreported and is reprinted in the Appendix hereto.

JURISDICTION

This matter was originally heard before an administrative tribunal of the state of South Carolina. Under the Occupational Safety and Health Administration Act, South Carolina administers OSHA as opposed to the federal Department of Labor. The tribunal issued its decision on January 1, 2004 finding in favor of S.C. OSHA.

Under South Carolina law at the time, appeal was to a state circuit court. Burris Electrical appealed. A hearing was held and the circuit court issued its decision on August 3, 2006 upholding the decision on the tribunal.

Burris Electrical appealed to the South Carolina Court of Appeals and that court issued its decision affirming the circuit court on January 23, 2008 and denied Burris Electrical's Petition for rehearing on April 18, 2008.

Burris Electrical filed a writ of certiorari to have the decision of the Court of Appeals reviewed by the Supreme Court of South Carolina. The South

Carolina Supreme Court denied the writ, without an opinion, on January 8, 2009.

This Court has jurisdiction to hear the final decision of the Supreme Court of the State of South Carolina.

STATUTES INVOLVED IN THE CASE

(a) Willful or repeated violation

Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than \$70,000 for each violation, but not less than \$5,000 for each willful violation.

29 U.S.C.A. § 666 (1990)

“Willful violation is nowhere defined in the Act, and the legislative history is sketchy. Thus, the Commission and the courts are charged with determining the meaning of willfulness in light of the policy and framework of the Act.”

St. Joe Minerals Corp. v. Occupational Safety and Health Review Com'n 647 F.2d 840, 845 -846 (C.A.8, 1981).

STATEMENT OF THE CASE

Bad facts make for bad law. This Petition concerns a narrow but extremely important question

about how OSHA violations should be classified. The lower courts in this case have let the tragic nature of the underlying facts cheapen the most egregious classification of "willful violation" and thereby unfairly blacken the name of the Petitioner. If the lower decisions in this case are allowed to stand then a willful violation will be found anytime an employer does not consult the proper OSHA standards and willful can be based on prior citations even though the prior citations was withdrawn by OSHA and arose from very dissimilar facts. Instead, the highest regulatory condemnation should be reserved for cases in which the employer knowingly violated the law or, by its conduct, demonstrates it would have violated the law even if it had been aware of it.

A "willful violation" should be (and is) reserved for employers who either knowingly violate OSHA or for employers who unknowingly violate OSHA but the evidence shows they would have violated it even if they had known of OSHA requirements. The only evidence in this case is that Burriss made mistakes that led to a deadly accident. Burriss never would have willfully violated OSHA and never would have deliberately exposed its employees to a dangerous risk.

Burriss is a small, family-run, minority-run, electrical systems company. Burriss was the electrical contractor for the building of the Blythewood High School in Blythewood, South Carolina in 2002 and 2003. (R. 28, Hearing Tr. 10).

On January 28, 2003 Burriss Electrical was digging a trench for electrical conduit at the Blythewood site. The trench was eight foot deep and was far deeper than any trench Burriss had ever

dug. The operation was being supervised by a foreman that had no experience in ditches this deep. On the morning of January 28, several Burriss employees were working in the trench when a portion of the trench wall collapsed. The cave-in partially buried two of the employees and caused their deaths. (R. 32, Hearing Tr. 14).

Unbeknownst to Burriss, the trench was unsafe under OSHA standards for several reasons. First, OSHA requires a trench over four foot deep to have the side walls either sloped back or protected from collapse by a protective box. Second, OSHA requires a "competent person" (one trained on how to apply OSHA trenching rules) to inspect the trench daily. Finally, OSHA requires certain means of escape no at issue in this case.

Burriss Electrical is owned by Christie Burriss. The project manager for Burriss Electrical is her husband Tommy Burriss. (R. 77, Hearing Tr. 59). Mr. Burriss is the only management level employee in the company in charge of production. He relies on superintendents at each job site to manage day to day operations. (R. 77, Hearing Tr. 59). Mr. Burriss visits each site approximately once a week. (R. 77, Hearing Tr. 59).

It is uncontested that the Burriss Electrical rarely faced safety issues other than fall-protection and electrocution. (R. 80-81, Hearing Tr. 62-63). Burriss Electrical provided safety training on these issues. (R. 80, Hearing Tr. 62). Other than minor scrapes, the only significant injury a Burriss employee ever suffered was to fall and break an elbow. (R. 80, Hearing Tr. 62). This occurred some ten years prior to the cave-in. (R. 80, Hearing Tr. 62).

Burriss Electrical had never before dug a trench greater than two to four feet deep. (R. 81, Hearing Tr. 63). OSHA's investigator even admitted that the trench at the Blythewood cite was unprecedented for Burriss Electrical. (R. 70, Hearing Tr. 52). In fact, Mr. Burriss had no idea that the Blythewood employees had dug the trench 8 feet deep and was "extremely shocked" when he saw the ditch for the first time. (R. 84, Hearing Tr. 66). Notably, Mr. Burriss was anticipating the trench was only going under a three foot foundation. (R. 83, Hearing Tr. 65). If he had known the digging was eight feet deep, Mr. Burriss would have stopped the work and consulted someone with experience in trenching. (R. 85 Hearing Tr. 67). It is uncontested that neither Mr. Burriss nor Burriss Electrical (including the supervisor at the Blythewood site) had experience in trenching deeper than four feet and were unaware of the OSHA regulations requiring sloping or protective devices for trenches in excess of four feet. Likewise, they were not aware of the need to have a "competent person" (as defined by OSHA regulations) inspect the trench. (R. 85-87, Hearing Tr. 67-69).

The accident was simply a tragic accident born of a lack of knowledge about proper trenching techniques. There was not one shred of evidence that anyone with Burriss knew of the OSHA trenching standards or proceeded despite knowing of the danger.

Following an inspection of the cave-in, Complainant issued two citations consisting of five violations:

Citation 4

1. SCCR 71, 1-1926.651(k)(1) Failure to make daily inspections of excavations . . . by a competent person,

Citation 3

1. SCCR 71, 1926.21(b)(2) Failure to instruct each employee [on proper trenching] . . . no trench hazard recognition and avoidance safety training provided to employees in trench in excess of 7 feet deep . . .
2. SCRR 71, 1-1926.100(a) Failure to require employees working in areas where there is a possibility of head injury . . . no protective helmets worn by 4 employees in trench in excess of 7 feet deep at Building C area.
3. SCRR 71, 1-1926.651(c)(2) Failed to locate a stairway, ladder, ramp or other safe means of egress in trench excavation . . .
4. SCCR 71, 1-1926.652.(a)(1) Failed to protect each employee in an excavation from cave-in by an adequate protection system [and] SCCR 71, 1-1926.652(b)(1)(i) Failed to slope excavations at an angle not steeper than one and one-half horizontal to one vertical . . .

Following the accident, Burriss Electrical fully cooperated with OSHA and spent considerable resources improving its safety program. Burriss destroyed the trench where the accident occurred

and started over with a new trench that exceeded OSHA standards. (R. 117-123, Hearing Tr. 101-107).

Burriss Electrical did not contest the validity of any of the citations and did not contest the classifications of any of the violations within citation 3. The sole issue contested by Burriss Electrical was the classification of citation 4 as "willful."

The Trial Court: The trial court found willfulness based on evidence that Burriss could have know of the proper safety standards, should have known of them, and had the opportunity to learn of the appropriate standards. (R 15-17, Order, pp. 5-7). That court flat ignored the requirement that it find a knowing violation or that Burriss proceeded in the face of an appreciated risk. In addition to misapprehending the appropriate legal standard, the trial court got very sidelined with an incorrect perception that Burriss was trying to plead ignorance as a defense to a finding of willfulness. The real task, which the trial court ignored, was to find evidence that Burriss would have proceeded even if it knew of the applicable safety standards. The only evidence cited by the trial court that came close to addressing the OSHA's unmet burden is evidence that Burriss Electrical was cited in the past for not having a competent person. As explained below, however, this could not be used to support a finding of willfulness.

The trial court also misapprehended Tommy Burriss' testimony as an admission that he knew (prior to the accident) that his foreman was not a "competent person" as that term is defined under the OSHA regulations. In addition the trial court incorrectly noted as important that Burriss had

opportunity to learn of the trench condition. (R. 16, Order p. 6). Finally, the trial the court misapprehended that Mr. Burriss had knowledge before the accident that the trench was "dangerous" and "horrifying." (R. 16, Order p. 6).

The Court of Appeals: The Court of Appeals continued the errors of the trial court. That court affirmed the trial court by agreeing that the prior citation could be used as evidence that Burriss did know of the requirement to have a competent person on trenching. Like the trial court, the Court of Appeals also ignored the uncontested evidence that Burriss clearly did not know the technical meaning of "competent person" nor was it aware of the danger and therefore could not have willfully violated OSHA. The Court of Appeals disregarded caselaw making clear that, before a prior incident could be used to find a willful violation, it must involve similar factual circumstances. Finally, the Court of Appeals was clearly wrong in finding that Burriss ignored OSHA safety standards.

ARGUMENT

The Court Incorrectly Used a Prior Citation as Evidence that Burriss Knew of the Requirement for a Competent Person on Trenching

The touchstone of the court of appeal's decision is that Burriss knew of the OSHA "competent person" standard prior to the 2003 accident because Burriss had been cited, and had not

appealed, a citation for the same standard in 2000. The court reasoned that, therefore, Burriss had opportunity to learn the standard, should have known the standard and therefore was consciously indifferent toward it. There are several critical errors in this chain of logic.

First, Burriss did appeal the 2000 "competent person citation." The court of appeals mistakenly found that Burriss only appealed a citation for a scaffolding issue that was issued by OSHA at the same time. However, both citations were issued under the same "Report Number 0185-01." (R. 168). By letter dated September, 20, 2000, Burriss clearly appealed "Report Number 0185-01." (R. 170). Uncontestably, this included both citations and therefore both citations were appealed.

What happened next is also irrefutable. The competent person citation disappeared and was neither discussed, nor pursued by OSHA, nor incorporated in the settlement agreement that resolved Burriss' appeal. (R. 165). The testimony makes this clear as well. OSHA never discussed the competent person citation with Burriss. The entire focus was on the scaffolding citation. (R. 87-89, Hearing Tr. 69-71). The competent person citation was not discussed in the informal conference, nor in the settlement discussions, and was dropped from, and played no part in, the settlement agreement. (R. 86, Hearing Tr. 68); (R. 87-89, Hearing Tr. 69-71, R. 161, Ex. 1).

It is outrageous that the court of appeals bases a willful finding on a citation that was dropped by OSHA. In basing its decision finding a willful violation based on a prior citation that was dropped by OSHA, the court is effectively using a dismissed

charge as a prior conviction. This must be incorrect or else OSHA could always establish willfulness by simply charging employers with baseless allegations and then withdrawing them. It is denial of a fundamental fairness to use prior charges against employers when those charges are dropped or dismissed.

Even If The Court of Appeals Could Consider the Prior Charge, There is Still No Evidence that Burriss Intentionally Avoided Knowledge or Consciously Disregarded the Standard

Even if the court could have properly considered the withdrawn charge, it inappropriately concluded that Burriss intentionally disregarded this notice of the proper standard. Despite correctly noting that a simple "indifference" to the prior charge or notice of the standard was not enough to support a finding of willfulness,¹ the court of appeals found that Burriss "intentionally disregard[ed]" that knowledge.

There was no evidence of intentional disregard of the standard. In fact, the evidence makes clear that Burriss simply did not know about and did not understand the competent person standard.

Q: Did you know anything about the OSHA trenching standards?

¹ "an Employer's mere familiarity with the requirements of an applicable standard does not, in itself, establish willfulness." *Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD ¶ 24,419 (No. 76-3743, 1980).

A: No

Q: Did you know what a competent person meant?

A: No.

(R. 85, Hearing Tr. p. 67).

Q: I didn't remember the one that addressed the competent person. I remember the one that addressed the scaffolding issue.

(R. 86, Hearing Tr. p. 68)

A: Basically, the way I interpreted it at the time of this document and before the accident that we did not have a competent person on site . . . now that I know what a competent person definition is by OSHA and my definition are two different things

(R. 97, Hearing Tr. p. 79).

OSHA did not introduce any evidence to refute Mr. Burriss testimony on this point. In fact, OSHA itself is to blame for Mr. Burriss's failure to understand or appreciate the prior standard because OSHA placed no emphasis upon it and dropped the citation from the report. Had OSHA emphasized this charge, or had at least not dropped it, it is likely that Mr. Burriss would have noticed it, appreciated it, and taken action to correct it.

There is flatly no evidence that Burriss ignored knowledge gained from a prior citation. The court of appeals did not cite a single piece of evidence to support this conclusion.

The Court Failed to Address the Fact that the Prior Citation Could Not Be Used as Notice Because the Factual Circumstances Were Entirely Different

The court of appeals hinged its decision on the prior citation for failure to provide a competent person. However, courts have uniformly held that, for a prior incident to support a willful finding, the prior incident must clearly demonstrate, to the employer, the danger to be avoided. The court of appeals completely ignored this argument. See *Donovan v. Mica Const. Co.*, 699 F.2d 431 (8th Cir. 1983) (job foreman was aware of the prior cave-in and nevertheless instructed work to proceed, however, there was insufficient evidence of the nature and extent of the prior cave-in); *A.E. Staley Mfg. Co. v. Secretary of Labor*, 295 F.3d 1341 (D.C. Cir. 2002) (Willful violation found based on plain indifference where employer was aware that prisoner had been repeatedly injured by the same inmate before and took no action to prevent a recurrence); *McKie Ford, Inc. v. Secretary of Labor*, 191 F.3d 853 (8th Cir. 1999) (Willful violation through plain indifference found where employer knew employees were using a freight-only elevator and one employee had been injured on the freight elevator before); *Valdak Corp. v. Occupational Safety and Health Review Com'n*, 73 F.3d 1466 (8th Cir. 1996) (Willful violation through plain indifference found where employer knew that a safety device was broken and knew that the safety device was the only thing that prevented the injury involved).

The court ignored this argument probably because the evidence that was presented makes clear that the prior citation (even if it had not been withdrawn) was completely dissimilar to the Blythewood situation. The prior trench did not involve a danger to employees, was not under the

same circumstances, was a shallow trench, OSHA did not discuss the citation with Burriss, imposed no penalty, and OSHA dropped the citation from the final settlement. Therefore, the prior situation was completely unlike the Blythewood situation and, therefore did not put Burriss on notice of the danger.

The Court Erred in Finding that Burriss Made No effort to Acquaint Itself with Safety Standards

The court of appeals also erred in finding that there was evidence that Burriss made no effort to acquaint itself with safety standards. To the contrary, the record is clear that Burriss was well aware of the dangers common to its operations, *e.g.*, electrocution and fall protection. It is uncontested that the Burriss Electrical rarely faced safety issues other than fall-protection and electrocution.

Q: Before this accident, What were your primary concerns about safety?

A: I would say fall protection and electrocution.

...

A: ... We had training on fall protection. We discuss heat related injuries and I would visit the jobsites a lot of times and would communicate to the guys, say I feel there's a potential issue here ...

(R. 80-81, Hearing Tr. 62-63).

In fact, there was no evidence submitted by OSHA that Burriss was unaware of other OSHA regulations. The trial judge and the court of appeals misread the testimony on this point. What the

OHSA witness testified was that Burriss was unaware of the trenching standards. (R. 70). Thus, the court of appeals and the trial court, erred in finding Burriss was not aware of the regulations or safety standards in general.

CONCLUSION

What the court of appeals has done is to cheapen the willful classification and make it applicable based on a prior citation even though that prior citation was withdrawn and was completely dissimilar. The decision also makes the willful classification apply to any case in which the employer could have learned of the applicable OSHA citation and failed to do so. This would make it applicable in any case. Instead, this Court should correct this misapplication and re-establish that willful only applies when an employer deliberately violates OSHA or the evidence is such that, even if it had known of the correct OSHA standard, it would have violated it anyway.

Respectfully submitted

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May 7, 2008

APPENDIX

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Burriss Electrical, Inc., Appellant,

v.

**Office of Occupational Safety and Health, South
Carolina Department of Labor, Licensing and
Regulation, Respondent.**

**Appeal From Lexington County
Clyde N. Davis, Jr., Circuit Court Judge**

**Unpublished Opinion No. 2008-UP-070
Submitted January 2, 2008 – Filed January 23, 2008**

AFFIRMED

**Charles F. Thompson, Jr., of Columbia, for
Appellant.**

Joseph N. Connell, of Lugoff, for Respondent.

PER CURIAM: Burriss Electrical, Inc. (Burriss) appeals from a South Carolina Occupational Safety and Health Review Board (the Review Board) decision finding Burriss in willful violation of the South Carolina Occupational Safety and Health Regulation 71, 1-1926.651(k)(1)(1991)[1]. After two employees were killed when a vertical wall of an earthen trench collapsed, the Office of Occupational Safety and Health in the South Carolina Department of Labor, Licensing and Regulation (the

Department) cited Burriss for four serious violations and one willful violation of the South Carolina Occupational Safety and Health Regulation (the Act). Burriss appeals the citation for the willful violation, arguing that (1) the Review Board misapplied the legal standard for willful conduct in reaching a finding of willfulness; and (2) under an appropriate application of the standard there exists no substantial evidence to support a finding Burriss committed a willful violation. We affirm.[2]

FACTS

Burriss is an electrical systems contractor.[3] During 2002 and 2003, Burriss served as the electrical contractor for the building of the Blythewood High School in Blythewood, South Carolina. At the Blythewood site, Burriss dug a trench approximately 121 feet long in order to install feeder conduit for power and data communications underneath the building. Roughly eighty feet of the trench measured from six to eight feet deep, making that portion of the trench wall essentially vertical.

On the morning of January 28, 2003, a portion of the trench wall collapsed on several Burriss employees working in the trench. The cave-in partially buried two of the employees and caused their deaths. The Department sent an inspector to conduct a fatality inspection of Burriss' Blythewood site. As a result of the inspection, Burriss was cited for four serious violations (Citation 3 parts 1, 2, 3, and 4) and one willful violation (Citation 4).[4] The violations are as follows:

Citation 3 (Serious)

1. SCCR 71, 1-1926.21(b)(2) - Failure to instruct each employee in the recognition and avoidance of unsafe conditions. . . no trench hazard recognition [or] avoidance safety training provided to employees in trench in excess of 7 feet deep . . .

2. SCCR 71, 1-1926.100(a) - Failure to require employees working in areas where there is a possibility of head injury . . . to be protected by helmets [in that] . . . no protective helmets [were] worn by 4 employees in [a] trench in excess of 7 feet deep . . .

3. SCCR 71, 1-1926.651(c)(2) - Failed to locate a stairway, ladder, ramp or other safe means of egress in trench excavation that are 4 feet or more in depth . . .

4. SCCR 71, 1-1926.652(a)(1) - Failed to protect each employee in an excavation from cave-in by an adequate protection system [and] SCCR 71, 1-1926.652(b)(1)(i) - Failed to slope excavations at an angle not steeper than one and one-half horizontal to one vertical . . .

Citation 4 (Willful)

1. SCCR 71, 1-1926.651(k)(1) - Failure to make daily inspections of excavations . . . by a competent person for evidence of a situation that could result in possible cave-ins, . . .

A competent person is defined by the Act as:

[O]ne who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization

to take prompt corrective measures to eliminate them. In order to be a competent person for the purpose of this standard one must have had special training in, and be knowledgeable about soils analysis . . . the use of protective systems, and the requirements of this standard.

S.C. Code Regs. 71, 1-1926.650(b) (1991).

Burriss filed a notice of protest and a hearing was held before a single Review Board member. At the hearing, Burriss did not contest the four serious violations under Citation 3. The only issue before the Review Board member was the classification of a willful violation under Citation 4.

At the hearing, Tommy Burriss testified he had been to the Blythewood site a week prior to the excavation of the trench. He stated it was his understanding the trench was to be just over three feet deep. He further testified when he finally saw the trench on the day of the cave-in he was "extremely shocked to see that ditch that deep." He said "[i]t was horrifying" and "dangerous." He stated that had he been at the site he "would have told people to get out of [the] ditch . . . [t]here's just no way [he] would have exposed anybody to that."

When asked whether, at the time of the cave-in, he was aware of the Act's trenching regulations requiring a competent person to perform daily inspections, Tommy Burriss stated he was not aware of the regulations, nor did he have a copy of the OSHA standards, general standards, or construction standards. Yet, Tommy Burriss was questioned about an August 2000 citation issued at a Burriss' worksite at Stivers' Jeep. Burriss had both erected

scaffolding and dug a trench at the Stivers' Jeep worksite. With respect to the scaffolding, the Department cited Burriss for failure to install a guardrail along the sides and end of the scaffolding platforms, classified the violation as "serious," and proposed a \$300 fine. With respect to the trench, the Department cited Burriss for failure to perform daily inspections by a competent person pursuant to Regulation 71, 1-1926.651(k)(1) of the South Carolina Code. The Department classified the violation as "other than serious" and did not impose a fine therefor. Burriss protested the citation for the scaffolding violation and eventually entered a settlement agreement wherein Burriss agreed to pay a \$120 fine and "provide refresher training for its employees in fall protection." But, because no penalty was proposed for the citation for the trench violation, Burriss did not protest the trench violation.

Tommy Burriss admitted he read the Stivers' Jeep citation for lack of a competent person. Yet, at the time of the Blythewood site accident, Tommy Burriss testified he maintained the belief his site superintendant, David Marshall was "a competent person upon my definition." He admitted at the hearing, in hindsight, "now I know what a competent person definition is by OSHA and my competent person definition are two different things."

The Review Board member upheld the "willful" classification in Citation 4. Burriss filed a petition for review by the entire Review Board. The petition was denied. Burriss then appealed the matter to the circuit court. The circuit court affirmed the Review Board's denial of discretionary review as well as the

Review Board member's order upholding the citation and corresponding penalty. This appeal follows.

STANDARD OF REVIEW

This court's review of an administrative agency's findings of fact is limited. The court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact" when those facts are supported by substantial evidence. S.C. Code Ann. §1-23-380(A)(6) (2005)[5]; Dorman v. Dep't of Health & Env'tl. Control, 350 S.C. 159, 164-65, 565 S.E.2d 119, 122 (Ct. App. 2002). In determining whether the agency's decision was supported by substantial evidence, this court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the administrative agency reached. DuRant v. S.C. Dep't of Health & Env'tl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 706-07 (Ct. App. 2004). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. Id. at 420, 604 S.E.2d at 707. Further, the burden is on the appellant to prove convincingly that the agency's decision is unsupported by the evidence. See Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

A court can reverse an agency's findings, inferences, conclusions, or decisions if they are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of

discretion.” S.C. Code Ann. §1-23-380(A)(6) (2005). Further, a court may reverse where an agency’s decision is affected by an error of law. Id.

LAW/ANALYSIS

Burriss asserts the circuit court misapplied the legal standard for a willful violation and argues, under an appropriate application of the standard, there is no substantial evidence to sustain a citation for a willful violation of the Act. We disagree.

The Act itself does not define “willful” nor has this court had an opportunity to interpret its meaning. In its decision, the Review Board member defined a willful violation as “committed voluntarily with intentional disregard *or* demonstrated plain indifference to the Act,” citing Occupational Safety and Health Law, Mark A. Rothstein, West’s Employment Law Series, St. Paul, Minn. 1998, §315. See also Valdak Corp. v. Occupational Safety and Health Review Comm’n, 73 F.3d 1466, 1468 (8th Cir. 1996) (finding to support a classification of “willful” there must be substantial evidence the employer, intentionally disregarded or was plainly indifferent to the requirements of the Act); Intercounty Constr. Co. v. Occupational Safety and Health Comm’n, 522 F.2d 777, 780 (4th Cir. 1975), cert. denied, 423 U.S. 1072 (1976). When faced with a problem of statutory construction, we accord great deference to the interpretation given the statute by the agency charged with its administration. See Dunton v. S.C. Bd. of Exam’rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (“The construction of a statute by the agency charged with its administration will be accorded the most

respectful consideration and will not be overruled absent compelling reasons.”).

In the context of occupational safety and health laws, willfulness requires more than the constructive knowledge or mere knowledge that would suffice for a non-willful violation, but does not require a showing of malicious intent. Intercounty Constr. Co., 522 F.2d at 780, cert. denied, 423 U.S. 1072 (1976). “An act may be ‘willful’ if the offender shows ‘indifference’ to the rules; he need not be consciously aware that the conduct is forbidden at the time he performs it, but his state of mind must be such that, if he were informed of the rule, he would not care.” AJP Constr., Inc. v. Sec. of Labor, 357 F.3d 70, 74 (D.C. Cir. 2004)(citation omitted).

Employers are presumed to be familiar with standards that affect their business; therefore, ignorance or even misunderstanding of the standards does not excuse noncompliance. Sec. of Labor v. Hallmark Excavating, Inc., 6 OSHC 1898 (1978). Similarly, an omission or failure to act is willful, if it is done voluntarily and intentionally. Havens Steel Co. v. Occupational Safety and Health Comm’n, 738 F.2d 397, 401 (10th Cir. 1984). Furthermore, a prior warning from OSHA may be a factor in determining if willfulness exists. Valdak, 73 F.3d at 1469.

Burriss contends the circuit court’s decision contains various misapplications of the willful standard and a misinterpretation of the evidence and testimony presented to the Review Board member.

The Review Board member found sufficient evidence to sustain a willful violation of the Act as follows:

The preponderance of evidence shows that [Burriss] demonstrated plain indifference to the Act in many ways . . . If not intentional disregard, [Burriss'] clear indifference to the Act is very apparent by the uncontested absence of knowledge of safety and health standards applicable or potentially applicable to a rapidly growing commercial electrical contracting business, lack of possession of copies of the OSHA standards for general industry or construction, lack of [Burriss]-provided training of employees and supervisors for *all* potential hazards of the job, reliance on general contractors to provide adequate safety training for one's employees, lack of attention to the warning represented by a previous citation related to a specific trenching safety practice that would have helped eliminate other violations, and lack of attention to the practices of other nearby contractors at the same job site as to trenching safety.

The circuit court likewise relied on similar evidence to uphold the finding of willfulness. The court stated the fact "[Burriss] made no effort to acquaint anyone, including itself, with the occupational safety and health regulations . . . [and] did not even possess a copy of the occupational safety and health standards" evidenced Burriss' plain indifference to general safety considerations.

We find there is evidence of a willful violation from the complete absence of knowledge by Burriss of the safety and health standards applicable to its business at the time of the cave-in. Burriss does not dispute he was previously cited for various violations of OSHA standards, one of which was similar to the citation at issue herein. As indicated, the circuit

court found Burris made no effort whatsoever to acquaint himself or anyone else with the applicable standards.

An intentional disregard or plain indifference to the required standards suffices to demonstrate a willful act. One cannot be aware of the existence of regulatory standards, have the means to review and learn them, consciously fail to do so and then use lack of knowledge as an excuse. To willfully turn one's head to knowledge and to understanding the requirements of the law after being exposed to a similar citation in the past is tantamount to a conscious act, a conscious disregard, which would meet the definition of a willful act. One's act of avoiding knowledge or completely disregarding it might also be labeled as an intentional and voluntary act. Arguably, some form of indifference, in and of itself, without more, may not rise to the level of a willful act. However, we need not reach that question since the type of indifference herein indeed rises to the level of a willful act or conscious disregard of the existence of the standards and is much more than just a misunderstanding or a mere negligent or careless act. The policy of the law does not provide a shield to one who is consciously aware of a regulatory scheme but intentionally disregards or chooses to disavow himself of, or avoid, such knowledge or requirements. To do otherwise would defeat the intent and goals of the regulatory scheme.

Because we find this evidence alone sufficient to support a finding of willfulness, we need not determine whether the circuit court erred in its application of the willful standard or interpretation

of the other evidence as suggested by Burriss. Accordingly, the circuit court's order is

AFFIRMED.

**HUFF and PIEPER, JJ., and GOOLSBY, A.J.,
concur.**

[1] The text of Section 71, 1-1926.651(k)(1) does not appear in the South Carolina Code of Regulations. Instead, subarticle 7 indicates South Carolina law incorporates the federal Occupational Safety and Health Act (OSHA) Regulation 29 C.F.R. §1926, with a few exceptions. S.C. Code Regs. ch.71, subart. 7 (1991). This is the case with many other South Carolina Occupational Safety and Health Regulations. See e.g. S.C. Code Regs. ch.71, subarts. 6 & 8 (1991).

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

[3] Burriss is a family-owned business with Tommy Burriss as project manager and his wife, Christine Burriss, as president.

[4] In addition to citing an employer for a violation, the Department can classify the violation as: repeat, serious, or willful. S.C. Code Ann. §41-15-320 (Supp. 2006). Additional penalties are applied if any of these heightened classifications are used. Id.

[5] This court notes Act 387, effective July 1, 2006, has since modified S.C. Code Ann. §1-23-380 and certain appellate procedures. However, we review Burriss' claim pursuant to S.C. Code Ann. §1-23-380(A)(6) (2005) rather than S.C. Code Ann. §1-23-380(A)(5) (Supp. 2007) due to the fact the case arose under the prior appellate procedure. Regardless, as applied to this case, the only difference between the two statutes is the numbering of the statutory provisions.

THE SOUTH CAROLINA COURT OF APPEALS

Burriss Electrical, Inc., Appellant,

v.

Office of Occupational Safety and Health, South
Carolina Department of Labor, Licensing and
Regulation, Respondent.

The Honorable Clyde N. Davis
Lexington County
Trial Court Case No. 2004-CP-32-01804

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After careful consideration of the
Petition for Rehearing, the Court is unable to
discover that any material fact or principle of law
has either been overlooked or disregarded and hence,
there is no basis for granting a rehearing.

It is therefore ordered that the Petition for
Rehearing be denied.

/s/ Thomas E. Huff

/s/ Daniel Pieper

/s/ C. Paul Short

Columbia, S.C.

April 18, 2008

**THE SUPREME COURT OF SOUTH
CAROLINA**

Burriss Electrical, Inc., Appellant,

v.

**Office of Occupational Safety and Health, South
Carolina Department of Labor, Licensing and
Regulation, Respondent.**

**The Honorable Clyde N. Davis
Lexington County
Trial Court Case No. 2004-CP-32-01804**

**ORDER DENYING PETITION FOR WRIT OF
CERTIORARI**

Petition for Writ of Ceriorari Denied.,

/s/ Jean H. Toal C.J.

For the Court

January 8, 2009

128

(2)

No. 08-1251

Supreme Court, U.S.
FILED

MAY 11 2009

OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

BURRISS ELECTRICAL, INC.,

Petitioner,

v.

OFFICE OF OCCUPATIONAL SAFETY AND
HEALTH, SOUTH CAROLINA DEPARTMENT
OF LABOR, LICENSING, AND REGULATION,

Respondent.

**On Petition For Writ Of Certiorari To The
South Carolina Court Of Appeals**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED FOR REVIEW

This Court should deny Burriss Electrical's Petition for a Writ of Certiorari. However, if this Court grants the Petition, the single question for review should be as follows:

Is the South Carolina Occupational Health and Safety Review Board's finding that Burriss Electrical's admitted violation of S.C. Code Regs. § 71-I-1926.651(k)(1) was "willful" supported by substantial evidence?

This Court should deny Burriss Electrical's Petition for a Writ of Certiorari for the initial reason that Burriss Electrical fails to articulate a Question Presented that states with brevity or clarity, and without repetition, the issue it wishes this Court to consider. *See* Sup. Ct. R. 14.4 ("The failure of a petitioner to present with . . . brevity[] and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition."); Sup. Ct. R. 14.1(a) ("The questions [presented] should . . . not be . . . repetitive.").

Burriss Electrical's Petition for a Writ of Certiorari states three proposed Questions Presented:

- 1) Did the Court of Appeals err in finding that Burriss knowingly violated OSHA and deliberately subjected employees to serious risk of harm based on a prior OSHA

**QUESTION PRESENTED
FOR REVIEW – Continued**

citation that had been withdrawn and involved very dissimilar facts?

2) Did the Court of Appeals ignore uncontested evidence that Burriss had no appreciation of the OSHA standards, or the danger, and therefore could not have willfully violated OSHA?

3) Did the Court of Appeals incorrectly find that Burriss deliberately ignored OSHA when, in fact, the uncontroverted evidence is that Burriss was very careful about the safety issues it knew about?

These three questions each address the same issue, with each emphasizing a different piece of evidence, or purported lack thereof. By stating in three questions what is really a single issue, Burriss Electrical's Questions Presented fail to present with brevity and clarity, and without repetition, the information needed for a ready and adequate understanding of the issue in this case. For this initial reason, and others set forth below, this Court should

**QUESTION PRESENTED
FOR REVIEW – Continued**

deny Burriss Electrical's Petition for a Writ of Certiorari.¹

¹ Burriss Electrical's proposed Questions Presented also misapprehend the nature of appellate review of administrative agency decisions. Specifically, they suggest that the South Carolina Court of Appeals made factual findings. In reality, the South Carolina Court of Appeals made no factual findings. *Burriss Elec., Inc. v. Office of Occupational Safety and Health*, Unpublished Opinion No. 2008-UP-070 (S.C. Ct. App. Jan. 23, 2008) (per curiam) (included in Appendix to Burriss Electrical's Petition). Rather, it reviewed a finding of the South Carolina Occupational Health and Safety Review Board (the "Board") to determine if that finding was supported by substantial evidence. *Id.*; see also S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). Likewise, if this Court grants Burriss Electrical's Petition, it will not make independent findings, but instead also determine only whether the Board's finding was supported by substantial evidence. *Arkansas v. Oklahoma*, 503 U.S. 91, 112-13, 112 S. Ct. 1046, 1060 (1992).

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STATEMENT OF THE CASE

Death of Two Employees

Two employees of Burriss Electrical were killed when the vertical wall of a six- to eight-foot deep earthen trench they were working in collapsed and buried them. (R. 28, lines 21-25; R. 29, lines 1-3; R. 32, lines 16-23; R. 161.) The employees had been hired at the job site the previous day. (R. 44, line 20-21; R. 102, lines 19-25.) They were not provided with helmets to wear while in the trench (R. 47, lines 18-25; R. 48, lines 1-18), and Burriss Electrical admitted that it "basically hadn't provided any training to employees that were in the trench" (R. 33, lines 10-11; R. 32, lines 7-8; R. 44, lines 20-23; R. 45, lines 3-5).

The Trench

Burriss Electrical dug the trench in order to run an electrical conduit while working on a new high school in Blythewood, South Carolina. (R. 78, lines 16-20; R. 81, lines 15-24.) The trench ran for 121 feet, about eighty of which was between six and eight feet deep. (R. 32, lines 16-23; R. 161-64.) Thomas Burriss, the project manager, saw the trench only after the cave-in and was "extremely shocked to see that ditch that deep." (R. 77, lines 7-14; R. 84, lines 8-20.) He said that "[i]t was horrifying" and "dangerous." (R. 84, lines 16-17, 25.) He testified that had he been at the site he "would have told people to get out of [the] ditch." (R. 84, lines 22-23.) "There's just no way [he]

would have exposed anybody to that." (R. 84, lines 23-24.)

Notwithstanding the plain danger posed by the trench, Burriss Electrical had no system in place to shore up the walls and prevent cave-ins. (R. 55, lines 22-25; R. 56-57.) Nor had Burriss Electrical provided any ladder, ramp, or other means of exit from the trench in the eighty-foot stretch that was six to eight feet deep. (R. 32, lines 19-23; R. 51, lines 20-23.) The only means of egress from the trench was on one end where it "had been filled in somewhat to bring the bottom . . . to within about 42 inches of the surface of the ground." (R. 52, lines 9-19.)

Burriss Electrical's Safety Program

During its ten years in business prior to this cave-in, Burriss Electrical never obtained for itself a copy of the State's construction safety regulations. (R. 79, line 4; R. 103, line 25; R. 104, lines 1-17.) As to safety training, Thomas Burriss explained:

We had training on fall protection. We discussed heat-related injuries, and I would visit the jobsites a lot of times and would communicate to the guys, say I feel like there's a potential here of a problem. If there's conduit stubbed up and, you know, it's open where somebody could fall on it and impale themselves or tripping hazard, stuff like that.

(R. 80, lines 22-25; R. 81, lines 1-4.) He later testified that they also “discussed various hazards with electrocution.” (R. 103, lines 1-9.) It is not clear, however, where such training took place or how formal it was since Burriss Electrical experienced a high turnover rate with respect to about half of its roughly eighty employees (R. 79, lines 8-9; R. 107, lines 6-18), and since employees were often hired at job sites and not required to report to the company’s office (R. 80, lines 20-25; R. 81, lines 1-4; R. 102, lines 6-25). Moreover, Thomas Burriss visited each job site, on average, only “once a week at least.” (R. 78, lines 8-10.) Although he said that the employees at each site were required to attend any safety meetings held by the general contractor at the site, he conceded that not all general contractors held such meetings (R. 103, lines 9-24).

Prior Citations

In August of 2000, two and a half years prior to the incident giving rise to this case, Respondent, the Office of Occupational Safety and Health in the South Carolina Department of Labor, Licensing and Regulation (the “Department of Labor”), issued two citations to Burriss Electrical. (R. 90, lines 15-19; R. 168-69.) At that time, Burriss Electrical was working on a site where it had erected scaffolding and dug a trench. (R. 86, lines 15-25; R. 87, lines 1-9; R. 89, lines 19-25; R. 90, lines 1-14.) With respect to the scaffolding, the Department of Labor cited Burriss Electrical for failure to install a guardrail along the scaffolding platforms, classified the violation as “serious,” and

proposed a \$300 fine. (R. 108, lines 15-19; R. 168.) With respect to the trench, the Department of Labor cited Burriss Electrical for failure to comply with S.C. Code Regs. § 71-I-1926.651(k)(1), which requires in relevant part (1) “[d]aily inspections of excavations [and] the adjacent areas . . . for evidence of a situation that could result in possible cave-ins . . . or other hazardous conditions,” and (2) that the inspections “be made by a competent person.” (R. 169.) The Department of Labor classified this violation as “other than serious” and did not impose a fine therefore. (R. 108, lines 19-25; R. 109, line 1; R. 169.)

Burriss Electrical protested the citation for the scaffolding violation and eventually entered a settlement agreement wherein it agreed to pay a \$120 fine and “provide refresher training for its employees in fall protection.” (R. 165-76, 170.) Burriss Electrical paid little attention to the citation for the trenching violation: Thomas Burriss testified, “Since there was no penalty I didn’t protest it.” (R. 86, lines 10-25; R. 109, lines 1-11.)

Failure to Comply With Known Trenching Regulations

Despite having been cited for multiple violations of State safety regulations, the only action Burriss Electrical took was to conduct the refresher training mandated by the settlement agreement, including showing to its employees a fall protection video. (R. 90, lines 20-25; R. 91, lines 1-4.) Burriss Electrical did

not bother, even at this time, to obtain or read a copy of the State construction safety regulations. (R. 103, line 25; R. 104, lines 1-17.)

Burriss Electrical's project manager, Thomas Burriss, did, however, read the August 2000 trenching violation citation:

Q. ... To whom [d]o OSHA violations, alleged OSHA violations, or citations therefor[] come to?

A. Usually they just come in the mail registered or certified and either myself or somebody at the office signs for them, but I would say I would be the one that would read them and react to those.

Q. Do you deny having seen this document before, the [August 2000 trenching] citation?

A. No, sir, I don't deny it.

Q. So at least at the time of receipt of this citation that we're talking about, the 2000 citation, you were aware of 1926.651(k)(1); is that correct?

A. I don't know if I'd say I was aware of, but I've seen the document, yes, sir.

Q. And the document discusses that standard, correct?

A. That's correct, yeah.

Q. And would it normally be your practice to read citations?

A. Yes, it would. You know, I read this – I'm pretty sure the way I feel I read this document, and under "A" I guess on the bottom of the document it says, "A. No competent person on site knowledgeable in soil analysis, trenching system, and the trenching standard." Basically the way I interpreted it at the time of this document and before this accident, that we did not have a competent person on site, and a competent person – now that I know what a competent person definition is by OSHA and my competent person definition are two different things. . . .

(R. 96, lines 6-25; R. 97, lines 1-11.)

At the time of the cave-in, Thomas Burriss, with apparent recollection of the requirements of S.C. Code Regs. § 71-I-1926.651(k)(1), was relying on his job site superintendent, David Marshall,² to fulfill the requirements of the safety regulation:

Q. Having previously been exposed to the standards for excavations and inspections thereof, did you insure that someone went out there and inspected that trench?

² Marshall was one of two superintendents at the August 2000 job site where Burriss Electrical was first cited for failure to have a competent person. (R. 97, lines 24-25; R. 98, lines 1-10.)

A. I was expecting my person, David Marshall, to be in charge of inspecting that trench, yes, sir.

Q. Who does Mr. Marshall report to?

A. To myself.

Q. Prior to the accident, did you have any conversations with Mr. Marshall as to whether or not he was making sure that trench was according to specs?³

A. We talked about the trench being different variances of width and how we were going to do it because of we had different electrical rooms that we had to feed. We talked many different ways of how we were going to do it, but never came to really a conclusion of how we were going to actually finally get it done.

Q. Did you talk about daily inspections of the adjacent areas?

A. No, sir.

Q. Did you talk about daily inspections of protective systems?

A. No, sir.

Q. Did you talk about whether Mr. Marshall was a competent person or he had a competent person?

³ Marshall and Thomas Burriss spoke with each other "two or three times a day." (R. 105, lines 15-18.)

A. No, sir. I didn't talk about it but I felt like he was a competent person upon my definition before the accident.

Q. So you felt that he would be able to recognize evidence of a situation that could result in possible cave-ins, indications of failure or protective systems, and hazardous conditions?

A. Yes, sir.

(R. 99; R. 100; R. 101, lines 1-4.)

However, neither Marshall nor Thomas Burriss met the regulatory definition of "competent person." (R. 62; R. 63, lines 1-2.) Neither was trained with respect to trench wall protective systems (R. 62, lines 16-20), and Marshall did not know of the daily trench inspection requirement (R. 70, line 25; R. 71, lines 1-4). Not surprisingly, therefore, Marshall did not conduct any soil analysis, shore up the trench walls, or conduct inspections of the trench and adjacent areas, as required by S.C. Code Regs. § 71-I-1926.651(k)(1). (R. 60-63; 99-100; 101, lines 1-3.) Thomas Burriss did not even visit the site to see the trench until after the cave-in. (R. 83, lines 11-18; R. 84, lines 8-17.)

It Took a Double Fatality

Burriss Electrical did not have a copy of the State's workplace safety regulations during its first seven years in business. (R. 103, line 25; R. 104, lines 1-17.) It did not obtain a copy after being cited for

violations of those regulations (*id.*), and it did not substantially change its safety program after that time (R. 90, lines 20-25; R. 91, lines 1-10; R. 103). Nor did it subsequently follow the trenching regulations that had been brought to its attention. (R. 60-64.) Rather, Thomas Burriss testified that it took the death of two company employees for him to realize his role, as project manager, to ensure compliance with workplace health and safety regulations:

Q. In your capacity as [project] manager, what is your position regarding what responsibility, if any, you have to know the rules and regulations governing occupational safety and health in your workplace?

A. . . . I feel like this accident has made me realize that I'm the one that is responsible for safety.

(R. 95, lines 16-25.)

Procedural History

The South Carolina Department of Labor investigated the double fatality and cited Burriss Electrical for four "serious" violations of various regulations (R. 2, 28, 45-49), and Burriss Electrical admitted those violations (R. 2-3). The South Carolina Department of Labor also issued to Burriss Electrical one citation for a "willful" violation of S.C. Code Regs. § 71-I-1926.651(k)(1), the section requiring a competent person to conduct daily inspections of any trench site

and its adjacent areas. (R. 2-3, 59-67.) Burriss Electrical has never disputed that it violated section 71-I-1926.651(k)(1). (See, e.g., R. 12 n.2.) However, it has, at every stage of this case, contested the classification of that violation as “willful.” (See, e.g., *id.*)

Burriss Electrical first filed a Notice of Protest to the citation, and a hearing was held before Elaine L. Craft of the South Carolina Occupational Health and Safety Review Board. (R. 12.) Board Member Craft’s order upheld the “willful” classification. (R. 9.) Burriss Electrical then filed a Petition for Review by the entire Board, which the Board denied, upholding Board Member Craft’s order. (R. 12.) Burriss Electrical then appealed to the South Carolina Court of Common Pleas, which affirmed Board Member Craft’s order. (R. 12, 21.) Burriss Electrical then appealed to the South Carolina Court of Appeals, which also affirmed the finding of a “willful” violation. *Burriss Electrical, Inc. v. Office of Occupational Safety and Health*, Unpublished Opinion No. 2008-UP-070 (S.C. Ct. App. Jan. 23, 2008) (per curiam) (included in the appendix to Burriss Electrical’s Petition for a Writ of Certiorari). Burriss Electrical filed a Petition for Rehearing in the Court of Appeals. (Appendix to Burriss Electrical’s instant Petition.) When that petition was denied, Burriss Electrical filed a Petition for a Writ of Certiorari in the South Carolina Supreme Court. (*Id.*) That petition was also denied (*id.*), and Burriss Electrical then filed the instant Petition with this Court.

ARGUMENT

I. THIS COURT SHOULD DENY BURRISS ELECTRICAL'S PETITION FOR A WRIT OF CERTIORARI BECAUSE THE COURT LACKS JURISDICTION.

The rules of this Court require a petitioner for a writ of certiorari to identify "the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question." Sup. Ct. R. 14.1(e)(iv). If the petition is for review of a state court judgment, the rules also require a petitioner to "show that [a] federal question was timely and properly raised" in the state court. Sup. Ct. R. 14.1(g)(i). Burriss Electrical's Petition fails to comply with either of these requirements (Petition for a Writ of Certiorari, pp. 3-4) and the Court should deny Burriss Electrical's Petition, on that basis, *Dept. of Mental Hygiene of Cal. v. Kirchner*, 380 U.S. 194, 197, 85 S. Ct. 871, 873 (1965) ("This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.")

Burriss Electrical's failure to show that a federal question was raised in the state court is due to the fact that there was no federal question raised in the state court. This case involves only the application of a South Carolina state regulation, S.C. Code Regs. § 71-I-1926.651(k)(1). *Burriss Electrical, Inc. v. Office of Occupational Safety and Health*, Unpublished Opinion No. 2008-UP-070 (S.C. Ct. App. Jan. 23,

2008) (per curiam) (included in the Appendix to Burriss Electrical's Petition for a Writ of Certiorari). "Authority for the Federal Government to decide questions of state law exists only by virtue of the Diversity Clause in Article III." *Glidden Co. v. Zdanok*, 370 U.S. 530, 537-38, 82 S. Ct. 1459, 1466 (1962). Because this case involves only the application of a South Carolina state regulation, and because there is no diversity of citizenship between the parties, this Court lacks jurisdiction over this case and should therefore deny Burriss Electrical's Petition.⁴

⁴ Burriss Electrical made no assertion below that S.C. Code Regs. § 71-I-1926.651(k)(1) operates in an area preempted by federal law, and such an assertion would be unavailing in any event. Section 71-I-1926.651(k)(1) is part of South Carolina's Occupational Safety and Health Regulations. See S.C. Code Ann. § 41-15-210 (Supp. 2008); S.C. Code Regs. § 71-100 *et seq.* Congress granted states the opportunity to implement their own plans for the enforcement of occupational safety and health standards. 29 U.S.C. § 667(b) (2006). Once such a state plan is approved by the United States Secretary of Labor, the state plan "displaces the federal [OSHA] standards," and federal law no longer preempts that state's regulations. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 97-99, 112 S. Ct. 2374, 2382-83 (1992). South Carolina's occupational safety and health plan received final approval from the Secretary of Labor on December 15, 1987, 29 C.F.R. § 1952.94 (2008), and, therefore, federal occupational safety and health standards no longer apply in South Carolina, 29 C.F.R. § 1952.95 (2008); *Gade*, 505 U.S. at 97-99, 112 S. Ct. at 2382-83. Thus, an assertion of a federal question arising in this case by virtue of federal preemption would be unavailing.

II. THIS COURT SHOULD DENY BURRISS ELECTRICAL'S PETITION FOR A WRIT OF CERTIORARI BECAUSE BURRISS ELECTRICAL FAILS TO PRESENT A COMPELLING REASON FOR A GRANT OF CERTIORARI IN THIS CASE.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion," and this Court will grant a petition for a writ of certiorari "only for compelling reasons." Sup. Ct. R. 10. When a petitioner seeks review of a state court decision, it typically must show that the state court decided "an important question of federal law." Sup. Ct. R. 10(c). This Court will "rarely" grant a petition for a writ of certiorari "when the asserted error consists [merely] of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Even if this case presented a federal question, Burriss Electrical fails to show that there is a compelling reason for a grant of certiorari in this case.

The South Carolina Occupational Health and Safety Review Board (the "Board") found that Burriss Electrical's admitted violation of S.C. Code Regs. § 71-I-1926.651(k)(1) was "willful." The South Carolina Court of Common Pleas affirmed that finding, and the South Carolina Court of Appeals likewise concluded that the Board's finding was supported by substantial evidence. In so holding, the South Carolina Court of Appeals explained that "[a]n act may be 'willful' if the offender shows 'indifference' to the rules; he need not be consciously aware that the

conduct is forbidden at the time he performs it, but his state of mind must be such that, if he were informed of the rule, he would not care.’” *Burriss Electrical, Inc. v. Office of Occupational Safety and Health*, Unpublished Opinion No. 2008-UP-070 (S.C. Ct. App. Jan. 23, 2008) (per curiam) (citation omitted) (included in Appendix to Burriss Electrical’s Petition, p. 24).

Burriss Electrical does not assert that the South Carolina Court of Appeals applied the wrong rule of law when it reviewed the Board’s factual finding. In fact, in its Petition for a Writ of Certiorari, Burriss Electrical articulates in terms substantively equivalent to those used by the South Carolina Court of Appeals the relevant legal rule: “A ‘willful violation’ should be (and is) reserved for employers who either *knowingly* violate OSHA or for employers who *unknowingly* violate OSHA but the evidence shows they would have violated it even if they had known of OSHA requirements.” (Petition for a Writ of Certiorari, p. 5.) Burriss Electrical then asserts simply that, under the South Carolina Court of Appeals’ properly stated definition of willfulness, there was insufficient evidence to support a finding that its violation of S.C. Code Regs. § 71-I-1926.651(k)(1) was “willful.” In other words, the error that Burriss Electrical asserts occurred consists of erroneous factual findings based on the alleged misapplication of a properly stated rule of law.

Burriss Electrical has already presented this argument in two prior levels of appellate review – one

in the South Carolina Court of Common Pleas, and one in the South Carolina Court of Appeals. The South Carolina Supreme Court declined to grant a third round of review. The scarce resource that is this Court's exercise of certiorari review should not be used simply to grant a particular party in state court litigation a third chance to challenge a state agency's factual finding, especially when the state's own highest court has declined to grant such review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Moreover, the South Carolina Court of Appeals' decision in this matter is unpublished and, therefore, may not be relied upon as precedent in future South Carolina cases. S.C. App. Ct. R. 239(d)(2). Burriss Electrical's assertion about what will surely follow "[i]f the lower decisions in this case are allowed to stand," fails to account for the fact that none of the lower decisions in this case are binding or can even be cited in future South Carolina cases. (Petition for a Writ of Certiorari, p. 5.) Thus, even if this case presented a federal question (and it does not), Burriss Electrical fails to give a compelling reason for this Court to review a state court opinion that has no precedential effect, even in the state where it was issued. Hence, this Court should deny Burriss Electrical's Petition for the additional reason that there is no compelling reason for this Court's grant of certiorari review in this case. *See* Sup. Ct. R. 10.

III. THIS COURT SHOULD DENY BURRISS ELECTRICAL'S PETITION FOR A WRIT OF CERTIORARI BECAUSE BURRISS ELECTRICAL FAILS TO STATE WITH ACCURACY THE EVIDENTIARY INFORMATION ESSENTIAL TO A READY AND ADEQUATE UNDERSTANDING OF THE POINTS IT WISHES THIS COURT TO CONSIDER.

"The failure of a petitioner to present with accuracy . . . whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition [for certiorari]." Sup. Ct. R. 14.4. Burriss Electrical's Petition for a Writ of Certiorari contains sweeping and material assertions about the evidence that are not supported by the record. Thus, even if the Court concludes that Burriss Electrical's Petition for a Writ of Certiorari presents an important and federal question, it should still deny the Petition because Burriss Electrical has failed to state with accuracy the evidentiary information essential to a ready and adequate understanding of the points it wishes this Court to consider. *See id.*

Specifically, in the second of its proposed Questions Presented, Burriss Electrical asserts that there is "uncontested evidence that Burriss had no appreciation of the OSHA standards." Burriss Electrical essentially repeats this assertion elsewhere in its Petition:

Unbeknownst to Burriss, the trench was unsafe under OSHA standards for several

reasons[,] . . . [including that] OSHA requires a "competent person" . . . to inspect the trench daily.

(Petition for a Writ of Certiorari, p. 6.)

Likewise, they were not aware of the need to have a "competent person" . . . inspect the trench.

(Petition for a Writ of Certiorari, p. 7.)

There is flatly no evidence that Burriss ignored knowledge gained from a prior citation.

(Petition for a Writ of Certiorari, p. 13.)

These assertions are belied by the record. The testimony of Thomas Burriss himself is that prior to the incident giving rise to this case he had received and read the August 2000 citation for failure to have a competent person inspect a trench:

Q. . . . To whom [d]o OSHA violations, alleged OSHA violations, or citations therefor[] come to?

A. Usually they just come in the mail registered or certified and either myself or somebody at the office signs for them, but I would say I would be the one that would read them and react to those.

Q. Do you deny having seen this document before, the [August 2000 trenching] citation?

A. No, sir, I don't deny it.

Q. So at least at the time of receipt of this citation that we're talking about, the 2000 citation, you were aware of 1926.651(k)(1); is that correct?

A. I don't know if I'd say I was aware of, but I've seen the document, yes, sir.

Q. And the document discusses that standard, correct?

A. That's correct, yeah.

Q. And would it normally be your practice to read citations?

A. Yes, it would. You know, I read this – I'm pretty sure the way I feel I read this document. . . .

(R. 96, lines 6-25; R. 97, line 1.) Thomas Burriss went on to explain that he not only "read" but also "interpreted" the August 2000 trenching citation: "Basically, the way I interpreted it at the time of this document and before this accident" (R. 97, lines 5-6.) That he both "read" *and* "interpreted" the August 2000 trenching citation "at the time," in 2000, is evidence that Burriss Electrical knew before the Blythewood incident of the requirement to have a competent person perform daily trench inspections. Indeed, further testimony from Thomas Burriss evidences that he remained aware of the trenching regulations through the time of the Blythewood cave-in:

Q. Having previously been exposed to the standards for excavations and inspections thereof, did you insure that someone

went out there and inspected that trench?

- A. I was expecting my person, David Marshall, to be in charge of inspecting that trench, yes, sir.

....

- Q. Did you talk [with Marshall] about whether [he] was a competent person or he had a competent person?

- A. No, sir. I didn't talk about it but I felt like he was a competent person upon my definition before the accident.

- Q. So you felt that he would be able to recognize evidence of a situation that could result in possible cave-ins, indications of failure or protective systems, and hazardous conditions?

- A. Yes, sir.

(R. 99, lines 1-6; R. 100, lines 4-13.) This testimony suggests that *at the time of the Blythewood project* Thomas Burriss "felt" and "was expecting" the need for trench inspections, and the need for a "competent person" to conduct those inspections. Yet it is uncontested that Burriss Electrical did not cause there to be any trench inspections, by a competent person or otherwise. Given the foregoing testimony of Thomas Burriss himself, the assertions in Burriss Electrical's Petition for a Writ of Certiorari that there is "uncontested evidence that Burriss had no appreciation of the OSHA standards," that it was "not

aware of the need to have a 'competent person' . . . inspect the trench," and that "[t]here is flatly no evidence that [it] ignored knowledge gained from a prior citation" (Petition for a Writ of Certiorari, pp. 6, 7, 13), are inaccurate, to say the least.

Burriss Electrical's second proposed Question Presented contains the additional assertion, repeated elsewhere in the Petition, that there is "uncontested evidence that Burriss had no appreciation of . . . the danger." (Petition for a Writ of Certiorari, pp. 6, 7.) But Thomas Burriss testified that the Blythewood trench was plainly "horrifying" and "dangerous." (R. 84, lines 16-17, 25.) He testified that "[t]here's just no way [he] would have exposed anybody to that," and that had he been at the Blythewood site he "would have told people to get out of [the] ditch." (R. 84, lines 22-24.) While Thomas Burriss did not see the Blythewood trench until after the accident (R. 83, lines 11-18; R. 84, lines 8-17), his job site superintendent, David Marshall, saw it repeatedly (see R. 99; R. 100; R. 101, lines 1-4; R. 105, lines 15-18), and his observations must be imputed to the company, *Ga. Elec. Co. v. Marshall*, 595 F.2d 309, 318 (5th Cir. 1979) (holding that the company, "through its foreman, made its choice" not to shore a trench); *Sec. of Labor v. Sinisgalli*, 17 OSHC 1849, 1852, OSHRC Docket No. 94-2981 (May 23, 1996) ("The foreman was aware of the excavation's condition. His knowledge is imputed to the employer."). Thomas Burriss testified that he "felt that [Marshall] would be able to recognize evidence of a situation that could result in

possible cave-ins." (R. 100, lines 4-18.) In light of this testimony, Burriss Electrical cannot now credibly contend that, although Thomas Burriss recognized the trench to be plainly "horrificing," "dangerous," and one that no one should be exposed to, its site superintendent would not have likewise recognized the plain danger. Hence, Burriss Electrical's assertion of "uncontested evidence" that it was not aware of the danger is also inaccurate.

Finally, Burriss Electrical's third proposed Question Presented asserts that "the uncontroverted evidence is that Burriss was very careful about the safety issues it knew about." Yet, although Burriss Electrical knew that it was required to give safety training to its employees (see R. 80, lines 22-25; R. 81, lines 1-4; R. 90, lines 20-25; R. 91, lines 1-4), it admits that it put two employees who had been hired at the job site the previous day into an eight-foot deep earthen trench without giving them any training (R. 28, lines 21-25; R. 32, lines 7-8, 16-23; R. 33, lines 10-11; R. 44, lines 20-23; R. 45, lines 3-5; R. 102, lines 19-25; R. 161). Thus, the assertion of there being uncontested evidence that Burriss Electrical was very careful about the safety issues it knew about is also inaccurate.

Burriss Electrical's inaccurate assertions about the evidence are not trivial. Rather, they go to the heart of the issue it wants this Court to review, i.e., whether there is substantial evidence to support a conclusion that it willfully violated the requirement that it cause daily inspections of its trench by a

competent person. Indeed, Burriss Electrical even proposes three Questions Presented instead of a single issue statement apparently for the precise purpose of making multiple (mistaken) assertions about the “uncontested” and “uncontroverted” evidence. Not surprisingly, it is exactly the evidence that Burriss Electrical makes inaccurate assertions about – its prior knowledge of the requirement for a competent person to conduct daily trench inspections, and of its disregard of known safety issues and the plain dangers of the Blythewood trench – that amounts to substantial evidence in support of the Board’s finding of willfulness.

Again, “[t]he failure of a petitioner to present with accuracy . . . whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition [for certiorari].” Sup. Ct. R. 14.4. Accordingly, this Court should deny Burriss Electrical’s Petition for a Writ of Certiorari because it is plagued by material inaccuracies regarding the evidence.



CONCLUSION

For each of the foregoing reasons, this Court should deny Burriss Electrical's Petition for a Writ of Certiorari.

Respectfully submitted,

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